

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE TUG SUNDIAL (Vessel ID No. 652357), *in rem*, BARGE 166, *in rem*,
BARGE 71, *in rem*, THE PIONEER, *in rem*, their apparel, tackle and
appurtenances; BANK OF AMERICA NA, *in personam*; and TIDEWATER BARGE
LINES, INC., *in personam*,

Defendants.

3:11-cv-00227-HU

In Admiralty

OPINION AND
ORDER

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OPINION AND ORDER

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3 Portland, OR 97204

4 Attorneys for Defendants

5 HUBEL, Magistrate Judge:

6 Pursuant to Federal Rules of Civil Procedure ("Rule") 33, 34
7 and 37(a), defendant Tidewater Barge Lines, Inc. ("Tidewater"),
8 moves the Court for an Order compelling plaintiff, the United
9 States of America (hereinafter, "the Government"), to: (1) respond
10 fully to Tidewater's First Requests for Production; (2) to produce
11 all non-privileged documents and/or portions of documents
12 responsive to Tidewater's requests; (3) to produce all documents to
13 which privilege is claimed under Army Regulation 385-10 (14 June
14 2010) 3-10(4)(c); (4) to produce all factual portions of documents
15 to which privilege is claimed under the pre-decisional or
16 deliberative privilege; (5) to produce all remaining documents
17 withheld to this Court for in camera evaluation of the
18 applicability of claimed privileges; and (6) to provide Tidewater
19 with reasonable form of protective order upon which the United
20 States has conditioned the production of certain documents.

21 As ordered during the March 13, 2012 hearing, the Government
22 must produce all factual material contained in the 1975, 1990, and
23 2008 Board of Investigation ("BOI") reports for the John Day
24 Navigation Lock, and all factual material contained in the 2006 BOI
25 for the Wilson Navigation Lock. The Government need not produce
26 the portions of those reports labeled as conclusions or labeled as
27 recommendations.

1 The Government must also produce the witness statements in
2 Appendix F referenced in the March 13 hearing. Certain redactions
3 from these witness statements are allowed as set forth below based
4 on the court's in camera review of those statements.

5 With respect to the Government's privilege log, the following
6 Bates numbered pages must be produced by the Government: (1) Bates
7 No. US02484, with the exception of paragraph 3; (2) Bates No.
8 US02485; (3) Bates No. US02487-88; (4) Bates No. US02489, with the
9 exception of lines 5-11; (5) Bates No. US02490, with the exception
10 of lines 8-9; (6) Bates No. US02491, with the exception of lines
11 16-26; (7) Bates No. US02492; (8) Bates No. US02493-2507; (9) Bates
12 No. US02518, with the exception of paragraph 3; (10) Bates No.
13 US02521-22 are unreadable, submit readable copy to court in camera;
14 (11) Bates No. US02525-26; (12) Bates No. US02527-39,¹ Appendix C,
15 with the exception of paragraphs 56, 67, and 78; (13) Bates No.
16 US02539-42, Appendix F, with the exception of the last 14 lines of
17 US02542; and (14) Bates No. US02544-58, with the exception of (a)
18 US02545 starting at line 24 with "This is due to . . ." through the
19 last line, (b) US02546 in its entirety, (c) US02547 lines 33-39,
20 (d) US02552 starting at line 32 with "and that better . . ."
21 through the end of that sentence, and (e) US02553 starting at line
22 11 with "this indicated to . . ." through the end of that paragraph
23 and line 24 starting at "In the I-Grade roving operator's
24 opinion . . ." through the end of that page.

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27 ¹ The court notes that the last page of Appendix C and the
28 first page of Appendix F in the Government's privilege log are both
Bates numbered US02539.

1 The Government need not produce any further Bates numbered
2 pages from its privilege log other than those identified in the
3 foregoing paragraph.

4 With respect to notes taken by David Stanton of the Army Corp
5 of Engineers, the Government shall produce the notebook submitted
6 to the court for in camera review in its entirety, with the
7 exception of: (1) page 10, lines 11-18; (2) page 13, lines 9-15 and
8 17-18; and (3) page 15, lines 18-19.

9 In terms of Tidewater's specific requests for production,² the
10 Government must produce:

- 11 • Request No. 2: All factual information regarding the
12 inspection or evaluation of the John Day Navigation lock. Any
13 recommendations or conclusions may be excluded.
- 14 • Request No. 3: Any factual material from any safety management
15 evaluation conducted by the Army Corps of Engineers on the
16 John Day Navigation Lock prior to the 2008 incident. Any
17 recommendations or conclusion may be excluded. If the
18 Government seeks the protection of the attorney-client
19 privilege with respect to any of the aforementioned material,
20 then an additional privilege log must be produced for the
21 court's inspection along with such documents for the court's
22 review.
- 23 • Request No. 6: All factual material regarding any
24 investigation by the Government into the 2008 incident by any
25 of the Government's employees. Conclusions and recommendations
26 may be omitted. If the Government seeks the protection of the

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28 ² These requests are based on Tidewater's reply memorandum and
representations made during a March 6, 2012 telephone conference.

1 attorney-client privilege with respect to any of the
2 aforementioned material, then an additional privilege log must
3 be produced for the court's inspection along with such
4 documents for the court's review.

5 • Request No. 7: All factual material regarding the 2008 John
6 Day Navigation Lock BOI. Conclusions and recommendations may
7 be omitted.

8 • Request No. 9: All documents collected by the Coast Guard
9 during its investigation of the 2008 incident, with the
10 exception of any conclusion, recommendation or material that
11 implicates the attorney-client privilege. If the Government
12 seeks the protection of the attorney-client privilege with
13 respect to any of the aforementioned material, then an
14 additional privilege log must be produced for the court's
15 inspection along with such documents for the court's review.

16 • Request No. 11: All photographs, video, digital images and
17 other visual documents demonstrating the condition of the John
18 Day Navigation Lock just prior to the accident and any time
19 thereafter.

20 • Request No. 15: All documents concerning the locations and
21 procedures for operating any video camera that covered the
22 scene where the 2008 incident occurred at the John Day
23 Navigation Lock, as they existed on February 28 and February
24 29, 2008, subject to the parties' protective order.

25 • Request No. 16: Any unedited video that recorded the 2008
26 incident at the John Day Navigation Lock that has not been
27 produced yet.

1 • Request No. 20: Any document which deals with the efforts
2 undertaken by the Government to preserve documents and video
3 relating to the 2008 incident. If the Government seeks the
4 protection of the attorney-client privilege with respect to
5 any of the aforementioned material, then an additional
6 privilege log must be produced for the court's inspection
7 along with such documents for the court's review.

8 • Request No. 25: All documents concerning the training,
9 experience, and disciplinary record of the Government's
10 personnel on duty at the time of 2008 incident at the John Day
11 Navigation Lock.³

12 • Request No. 28: Any statement recorded by any means regarding
13 the 2008 incident or any floating mooring bitt within the last
14 seven years.

15 • Request No. 29: All factual material contained in the 1975
16 John Day Navigation Lock BOI report. Any conclusion or
17 recommendation may be excluded.

18 • Request No. 30: All factual material contained in the 1990
19 John Day Navigation Lock BOI report. Any conclusion or
20 recommendation may be excluded.

21 • Request Nos. 31-33: All factual material contained in the 2006
22 BOI for the Wilson Navigation Lock. The Government need not
23 produce any standing order, operating procedures, or video
24 regarding incidents which took place at the Wilson Navigation
25 Lock, however.

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28 ³ The Government stipulated to this during a telephone
conference held on March 6, 2012.

1 These and anything else produced pursuant to this order shall
2 be subject to the protective order the parties agree upon. The
3 Government must comply with this order within fourteen (14) days
4 pursuant to Local Rule 37-2.

5 IT IS SO ORDERED.

6 Dated this 29th day of March, 2012.

7 /s/ Dennis J. Hubel

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10 Dennis James Hubel
11 Unites States Magistrate Judge
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